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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. —813

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILL DANIELS, INC., AND WALKER MOTORS, INC.

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GILBERT MOTOR SALES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Acting Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered on January 20, 1953, which denied enforcement of orders issued by the Board against Bill Daniels, Inc., Walker Motors, Inc., and Gilbert Motor Sales, Inc.[1]

[1] As explained more fully, *infra*, the *Daniels* and *Walker* cases were consolidated before the Board, and the *Gilbert* case was consolidated with the *Daniels-Walker* case for pur-

OPINIONS BELOW

The original opinion of the court below (D. 153–160) and the opinion denying rehearing (D. 169–171) are reported in 202 F. 2d 579. The findings of fact, conclusions of law and order of the Board in the *Daniels-Walker* case (D. 72–84, 93–98) are reported at 96 N. L. R. B. 1255; the Board's findings, conclusions and order in the *Gilbert* case (G. 157–166, 175–178) are reported at 97 N. L. R. B. 98.

JURISDICTION

The judgments of the court below were entered on January 20, 1953 (G. 197, D. 151). A petition for rehearing (D. 160–166), filed by the Board on February 6, 1953, was denied on March 17, 1953 (D. 169–171). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Respondents are Michigan automobile dealers operating under an agreement with the Ford Motor Company which is intended "to protect the good name and good will and business" of Ford and "to enable [Ford] to schedule its production

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poses of oral argument in the court below. For purposes of this petition, we cite the *Daniels-Walker* record as "D." and the *Gilbert* record as "G." The proceedings in the court below are bound in with the *Daniels-Walker* record at D. 151–171.

effectively." Pursuant to this agreement respondents regularly advise Ford of their anticipated needs of automobiles, parts, and accessories. A large percentage of the parts and accessories which Ford regularly supplies to respondents is manufactured outside the State of Michigan; the new cars similarly supplied respondents are assembled in Michigan from parts of which a large percentage is manufactured outside the State. The first question presented is whether respondents, who sell these cars, parts, and accessories largely within the State, are engaged in an activity affecting commerce within the meaning of the National Labor Relations Act.

2. Whether the Board, in determining whether a respondent's business affects interstate commerce, properly took official notice of evidence contained in a prior proceeding before it which involved the same respondent and the same issue.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), and of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001), are set forth in the Appendix, *infra*, pp. 27–32.

STATEMENT

I. The business of the several respondents

Each of the three respondent employers here involved refused to bargain with the union certi-

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fied by the Board, each claiming that its business did not affect commerce within the meaning of the Act (G. 186–187; D. 57, 63). The facts with respect to each employer's business may be summarized as follows:

A. GILBERT MOTOR SALES, INC.

Gilbert Motor Sales, Inc., hereinafter referred to as Gilbert, is a Michigan corporation engaged in selling and servicing new and used automobiles, parts, and accessories, with its principal office and place of business in Detroit, Michigan (G. 23–24, 158; 42, 51, 69, 140, 147–148, 152). It operates retail sales and service departments under a franchise from the Ford Motor Company of Dearborn, Michigan, from which it purchases virtually all its new cars, trucks, parts and accessories (G. 23–24, 158–159; 42–44, 51, 69, 107–113, 140–141, 147–148, 152). Gilbert's purchases during the first six months of 1948 amounted to $234,060.97 (G. 51–53); during the last six months of 1949, its purchases amounted to $798,021.27 (G. 158; 140, 191). Gilbert's sales, during the first six months of 1948 were in the amount of $371,264.02 (G. 52), while those during the second half of 1949 amounted to $842,362.80 (G. 158; 140, 191). Cars and trucks account for approximately 75 percent of Gilbert's purchases and sales; parts and accessories make up the balance (R. 51–52).

Approximately 54 percent of the parts and accessories sold by the Ford Motor Company to its

dealers for service purposes during the first half of 1948 were purchased by the Company from vendors located outside the State of Michigan and were resold to the dealers without further processing by the Company (G. 61, 66–69, 70–71). Using the percentages noted above, Gilbert's purchases of parts and accessories produced outside the State of Michigan, during the first six months of 1948, amounted to over $30,000, and during the last six months of 1949 to over $110,000.[2] While virtually all purchases and sales were made within the State of Michigan, the cars and trucks purchased by Gilbert, assembled by the Ford Motor Company in Michigan, were comprised largely of finished parts manufactured outside the State (G. 24, 158–159; 67–68, 73, 84).[3] Moreover, one-half of one percent of the Fords delivered to all dealers in Wayne County, where Gilbert is located, were completely manufactured outside the State (G. 71–72, 100–101).

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[2] These figures do not include the value of out-of-state equipment included on new cars assembled in Michigan, see note 3, *infra*.

[3] Many products, such as radiators, springs, wheels, coil springs, running boards, running board brackets, forgings for passenger cars and for trucks, transmissions, differentials, front suspensions, rear axles, and engine parts are manufactured by Ford outside the State of Michigan and are incorporated into the finished vehicles at the Michigan plant (G. 68, 73). In addition, Ford purchases tires, bumpers, and accessories from vendors whose plants are located outside the State (G. 73, 76).

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Gilbert, like the other 7,600 authorized dealers of the Ford Motor Company, is part of the nation-wide Ford Sales Organization, which is virtually the sole outlet for the sale of the Ford Motor Company's products, and is the end link of a vast industrial empire for the manufacture and distribution of Ford automobiles and trucks, Lincoln and Mercury automobiles, tractors, bus chassis, and parts and accessories for these vehicles (G. 24, 158–159; 32–43, 46, 60, 63–64, 75). Each dealer, when approved by Ford, executes a "Ford Sales Agreement" which is in the nature of a "franchise" from the Ford Motor Company (G. 43–44, 90, 107–113, 140, 193).

The purpose of the sales agreement is "to protect the good name and good will and business of [Ford Motor] Company, to assure Company that Company products will be made available to public and that service facilities will be made available to ultimate users of its products, and to assure or inform Company of the financial stability of Dealer" (G. 113). The agreement expressly "is intended" to "govern all relationships between Company and Dealer" (G. 43, 46, 79–80, 107) and also regulates the dealer's relationship with the public and with other dealers (G. 43–44, 80–82, 90–93, 99, 104–105, 108, 109–111, 193).

Upon the terms and conditions set forth in the sales agreement, the dealer obtains the privilege of purchasing, for resale at retail anywhere

within the United States, Ford automobiles, trucks, parts, and accessories (G. 107). The dealer agrees to purchase and pay for Company products in cash, except when the invoice shows the sale to be on credit (G. 50, 107),[4] at prices fixed by the Company, and to maintain specified stocks of automobiles, parts and accessories (G. 56–57, 77, 93–94, 96–98, 107, 109).[5] "To enable the Company to schedule its production effectively," dealers' orders sufficient to maintain the prescribed stocks of automobiles must be submitted before the tenth day of each month, and those for parts and accessories on dates designated by the Company (G. 109).

Other operations of the dealer's business, in addition to those concerning stocks of vehicles, parts, accessories, and orders, are also subject to extensive control by the Company under the sales agreement. The dealer's place of business must be maintained at a location and in a manner acceptable to the Company (G. 76, 89–90, 95–96, 108). The dealer is required to install tools, machinery, and equipment recommended by the Company (G. 70, 75, 108); to display approved

[4] Except in such credit sales, the Company retains title and power to retake and resell until it has actually received cash payment of the full purchase price (G. 50, 107–108).

[5] The sales agreement requires stocks of from eight to twelve percent of the previous year's retail deliveries of current model automobiles and trucks, and at least one-sixth of the previous twelve months' sales of parts and accessories (G. 93–94, 109).

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Ford signs conspicuously (G. 76, 108); to install and maintain an accounting system in accordance with the "Ford Dealers Accounting System Manual" as approved by the Company (G. 108); to submit financial statements when required by the Company on forms approved by the Company (G. 42–44, 61, 108, 117–118, 142–143); to submit "Dealer's Ten Day Reports" (G. 42–44, 61, 108, 115–116, 142–143); and to permit the Company to examine all records, contracts, and accounts, to inspect the dealer's stock and place of business, and to test the dealer's equipment and facilities (G. 70, 75, 90–93, 108).

Finally, each dealer pays to the Company, as part of the Company-fixed purchase price, a charge of $20 for each Ford vehicle (G. 44, 55, 62–63, 83, 84, 142). This fund is used by the Company, in its discretion, for promoting and advertising the Company's products and services (G. 44, 55–56, 75, 83). From these funds, in part, the Company defrays the cost of advertising through national radio programs and newspapers, as well as the cost of supplying its dealers with catalogs, handout materials, and other descriptive literature and sales manuals covering its products (G. 44, 62, 75, 82–84).

B. BILL DANIELS, INC.

Bill Daniels, Inc., hereinafter called Daniels, is a Michigan automobile dealer and operates, as does Gilbert, under a sales agreement with the

Ford Motor Company (D. 113, 118–119). During the first six months of 1949, Daniels' total purchases amounted to approximately $650,000, including approximately $51,000 worth of parts (D. 74; 44, 55, 103, 138–139). As noted in the case of Gilbert, over half the parts handled by Ford dealers in Michigan are manufactured outside the State (G. 61). Daniels' total sales during the first six months of 1949 amounted to about $1,193,000, of which about $11,930 represented direct sales in interstate commerce (D. 74; 139).

C. WALKER MOTORS, INC.

Walker Motors, Inc., hereinafter called Walker, is, like Gilbert and Daniels, a Ford dealer located in Michigan and operating under the same sales agreement (D. 60, 61, 112, 145). At the time of the hearing in the representation case, the statistics of Walker's operations as a Ford dealer covered a period of only six weeks (D. 146). Projecting those figures on an annual basis, Walker's total annual purchases would be $1,700,000, including over $85,675 worth of parts, over half of which, as noted above, are manufactured outside the State (D. 146, G. 61). Walker's annual sales, based on its first six weeks as a Ford dealer, would total $2,606,000 (D. 146).

II. Proceedings before the Board

A. THE GILBERT CASE

In April, 1948, the International Union (United Automobile, Aircraft, and Agricultural Implement Workers of America, CIO) filed a petition with the Board, claiming that it represented a majority of Gilbert's employees (G. 19–21). The same Union filed similar petitions with respect to twenty-one other Michigan automobile dealers (G. 22–23). At the hearing of all twenty-two petitions, which were consolidated, Gilbert, like the other dealers, specifically objected to the Board's assertion of jurisdiction, claiming that it was not engaged in activities affecting commerce (G. 39–40). Gilbert stipulated certain facts relative to its interstate business and also stipulated that Gilbert and all the other dealers operated under identical agreements with the Ford Motor Company (G. 51–52, 56). A representative of Ford, appearing in response to a subpoena, testified at length as to the extent to which Ford received parts from outside the State and as to the relationship between Ford and its dealers (G. 59–88). From the evidence showing the nature of Ford's operations and of the dealers' business, the Board determined that each of the dealers was subject to the Act and directed an election at each plant (G. 22 *et seq.*). At the plant of respondent Gilbert, the Union lost the election (G. 33–35).

In May of the following year, the International Union, this time joined by its Local 408, instituted another representation proceeding with respect to Gilbert (G. 119 *et seq.*). At the hearing in this proceeding counsel for Gilbert referred to the exhibits introduced at the hearing a year earlier and noted his willingness to have the Board refer to those exhibits (G. 140–142). The second proceeding culminated in an election which the Union won (G. 124–130), and it was certified by the Board (G. 136–137).

When Gilbert, notwithstanding the certification, refused to bargain, the Union filed the unfair labor practice charge giving rise to the present action (G. 145–147). At the hearing on this charge Gilbert again put in issue the question whether its business affected commerce (G. 153, 181). On this issue the trial examiner and the Board, with due notice to Gilbert, took official notice of the record before the Board in the earlier (April, 1948) representation proceeding (G. 175, 187–192). This record—"incorporated by reference" in the unfair labor practice case (G. 190, 192)—was later included in the certified record lodged with the court below (G. 14–16). On the entire record, the Board, concluding again that Gilbert was subject to the Act, held that Gilbert had unlawfully refused to bargain (G. 175–177).

B. THE DANIELS-WALKER CASE

Following the filing of separate petitions for representation of Daniels' and Walker's employees, the Board held hearings, concluded, over objections, that each respondent was engaged in commerce within the meaning of the Act, determined the scope of the appropriate bargaining units, and directed separate elections at each respondent's establishment (D. 16–21, 75–76; 22–24, 30–32, 45, 56–57, 134, 140–141). The International Union obtained a majority of the eligible votes in both elections and was thereafter certified by the Board (D. 76; 25–28, 33–36, 45–46, 57, 103–104).

Notwithstanding the certifications, each respondent refused to bargain with the Union on the sole ground that respondent was not subject to the provisions of the Act (D. 76, 77; 46–47, 57–58, 107–108, 109). The Union thereupon filed unfair labor practice charges with the Board, on the basis of which the General Counsel issued an order consolidating the cases for hearing and a consolidated complaint alleging that each respondent had violated Section 8 (a) (5) and (1) of the Act by its refusal to bargain with the certified representative of its employees (D. 72–73; 38–49, 66–67).

At the hearing, each respondent admitted its refusal to bargain with the Union, and the evidence introduced in the representation proceed-

ings was incorporated by reference without objection (D. 46–47, 57–58, 63–64, 104–105, 107–108, 109, 110–111). On the basis of this evidence and further evidence as to respondents' relationship to Ford (D. 111–119), the trial examiner and the Board (D. 72–84, 93–94, 98) determined that each respondent was engaged in activities affecting commerce within the meaning of the Act (D. 74–75), and accordingly concluded that respondents' admitted refusal to bargain with the Union violated Section 8 (a) (5) and (1) of the Act (D. 76, 78, 79).

III. The Board's orders

The Board ordered each of the three respondents to cease and desist from refusing to bargain collectively with the certified Union as the exclusive representative of its employees in the unit previously found appropriate, and from in any other manner interfering with the efforts of that Union to bargain on behalf of its employees (G. 175–178; D. 93–94, 95–96). Affirmatively, each order requires the respondent to bargain with the Union upon request, and to post the usual notices (G. 175–178; D. 94, 95–98).

IV. The decision of the court below

The court below set aside the orders of the Board on the ground that none of the respondents was engaged in an activity affecting commerce within the meaning of the Act. Holding that

"The circumstance that these dealers made all of their purchases in Michigan and practically all of their sales in Michigan is the controlling fact of the case" (D. 157), the court rejected the Board's contention that interstate commerce was affected through respondents' relations with Ford Motor Company. The court observed that these dealers were neither employees nor agents of Ford (D. 158) and could not properly be termed "franchised dealers" since only a sovereignty or state can confer a franchise (D. 154). Recognizing that its decision was in conflict with the decisions of the Court of Appeals for the First Circuit in *National Labor Relations Board* v. *Ken Rose Motors, Inc.*, 193 F. 2d 769, and *National Labor Relations Board* v. *Somerville Buick*, 194 F. 2d 56 (D. 159–160), the court in its original opinion and in its opinion denying rehearing held that the out-of-state goods sold by respondents "came to rest in the [Ford] Dearborn warehouse" (D. 170), and that "If there is any connection between [respondents'] local operations and interstate commerce, it is too remote to subject these respondents to the operation of the Act" (D. 159).

The court held further that the Board had erred in taking official notice of the facts in the earlier representation proceeding involving re-

spondent Gilbert (D. 156).[6] In its opinion denying rehearing the court rested this conclusion on its view that a different local union was involved in the earlier case, that the cases of other employers had been consolidated in the earlier record, and that as a general rule the Board could not take official notice of the record in other proceedings before it (D. 169–170).[7]

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that respondents' businesses did not affect commerce within the meaning of the Act.

2. In holding that the Board could not take official notice of the record made before it in a prior proceeding involving the same respondent and the same issue.

3. In failing to issue decrees enforcing the orders of the Board.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that respondents' activities do not affect commerce is in square

[6] The court sustained the Board's procedure in permitting the introduction of new evidence in the *Daniels-Walker* unfair labor practice hearing as to respondents' relationship to Ford (D. 156).

[7] The court advanced still other grounds for reaching this result in its original opinion (D. 156), but appears to have abandoned them in its later opinion. All the grounds advanced in both opinions are discussed *infra*, pp. 22–26.

conflict with the decisions of the Court of Appeals for the First Circuit in *National Labor Relations Board* v. *Ken Rose Motors, Inc.*, 193 F. 2d 769, and *National Labor Relations Board* v. *Somerville Buick*, 194 F. 2d 56, and with the decision of the Court of Appeals for the Ninth Circuit in *National Labor Relations Board* v. *Howell Chevrolet Company*, — F. 2d —, 31 L. R. R. M. 2462. Expressly recognized both by the court below (D. 159–160) and by the Court of Appeals for the Ninth Circuit (in the *Howell* case, *supra*), this conflict of decisions has led us not to oppose the petition for certiorari already filed by the employer in *Howell* (No. 703, this Term) and to apply now for review of the instant decision. For we think the obviously important issue in these cases as to the jurisdiction of the Board, affecting many of the thousands of sales outlets of a major national industry[*] (and probably affecting similar dealers in other industries as well), requires resolution by this Court. Moreover, we believe that the decision of the court below is contrary to controlling decisions of this Court.

certiorari granted May 18, 1953

[*] The impact of the decision of the court below cannot be restricted to automobile dealers located in Michigan. Although Ford's main plant is in Michigan, it maintains assembly plants in several other States; see, for example, the *Ken Rose* case, *supra*. The Michigan plant is no different from the other plants in that in each the major portion of the parts which make up the completed automobile are manufactured outside the State in which the vehicle is assembled.

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It is undisputed, of course, that the shipment of parts across State lines to Ford's assembly plant and warehouse is interstate commerce. It is equally clear that a work stoppage at any of respondents' places of business would curtail Ford's need for out-of-State parts and hence would "affect commerce" within the meaning of the Act. To be sure, the effect of a strike by the employees of any one dealer would not be critical, but, as this Court has twice observed, the question "is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 648; *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 685, n. 14; see also *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236.

There is, in short, no basis for the conclusion of the court below (D. 159) that the impact of respondents' activities on interstate commerce is "too remote" to warrant the Board's assertion of jurisdiction. "Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might

be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647–648.[9] Nor is there any doubt that the power of Congress (and hence the power of the Board, since Congress in the National Labor Relations Act has exercised "whatever power is constitutionally given to it to regulate commerce," *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607) extends to intrastate transactions which themselves affect interstate commerce. This broad power clearly reaches the situation here where, although not owned by Ford, each respondent dealer is so closely integrated into Ford's operations as to constitute merely the end link in Ford's multistate business of manufacturing and distributing automobiles and parts. As the Court of Appeals for the First Circuit held, directly contrary to the decision below, in *National Labor Relations Board* v. *Ken Rose Motors, Inc.*, 193 F. 2d 769, 771:

> The "Ford Sales Agreement" ties the respondent into a vast national network of an integrated distribution system which affects commerce. The activities of Ford and

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[9] See also *United States* v. *Women's Sportswear Association*, 336 U. S. 460, 464; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 234, 236; *Wickard* v. *Filburn*, 317 U. S. 111; *United States* v. *Sullivan*, 332 U. S. 689, 696–698.

the respondent are shaped to a pattern which is found throughout the nation.

Apart from the fact that respondents' operations affect the movement of parts across state lines to Ford's assembly plant, the decisions of this Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 568–569, and *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, 237–238, establish that the movement of parts and accessories from outside Michigan through Ford's warehouse to the dealers continues to be a movement "in interstate commerce" until the goods come to rest at the dealers, so that a strike at the dealers would also "affect" that commerce. Insuring the steady and orderly interstate flow of these commodities, Ford required each respondent to maintain on hand "a stock of genuine Ford parts and approved accessories of an assortment reasonably comparable to the current demand, equivalent to at least one-sixth of the sales of parts and accessories by [respondent] during the previous twelve months" (G. 109; D. 137, 145). For the express purpose of enabling Ford "to schedule its production effectively" each respondent was required to furnish Ford with its "estimated requirements of parts and accessories" (*ibid.*). In these circumstances, we submit, the movement of parts and accessories from outside the state through Ford to its dealers falls clearly within the holding in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 568–569, that out-of-

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state goods obtained "to meet the needs of specific customers" and ordered "pursuant to a pre-existing contract or understanding" continue to move in commerce until they reach the customer, notwithstanding any stop at a warehouse or intermediate transfer of title to the wholesaler. Any doubt that the movement of parts from Ford's warehouse to respondents was "in commerce" is dispelled by this Court's recent decision in *Standard Oil Co.* v. *Federal Trade Commission,* 340 U. S. 231, 237–238, where gasoline brought into Michigan from outside the state and stored by Standard was held to be moving "in interstate commerce" when it was eventually sold to independent jobbers in Michigan.[10]

In sum, respondents are subject to the Act both because their activities directly "affect" Ford's interstate purchases, and because the movement of parts and accessories from outside the state continues to be "in interstate commerce" until they are received by the dealers so that a strike at the dealers would necessarily "affect" the movement of that commerce.

2. As an additional ground for its decision as to respondent Gilbert, the court below held that

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[10] The Court expressly noted as a basis for holding that the sales were "in interstate commerce" that "the sales involved here * * * are those of an interstate producer and refiner to a local distributor * * *." 340 U. S. at 238, n. 6. Similarly, in the instant case Ford manufactures some of the parts in other states, just as Standard Oil produced the gasoline it later distributed within Michigan (G. 73).

the Board acted beyond its powers in taking official notice of the record before it in an earlier representation proceeding involving this same respondent.[11] This holding, effecting a significant restriction upon established Board procedure, is contrary to this Court's decisions in *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 519–21, 527–30, and *United States* v. *Pink,* 315 U. S. 203, 216, 218.[12]

Closely analogous is the *Pierce* case, where this Court rejected "the highly technical objection that the [Interstate Commerce] Commission, in the final stage of forming its judgment, could not in either case take account of what had been done in the other, notwithstanding the closely related character and objects of the applications and the prior proceedings." P. 528. Disposing of this argument, the Court said (*ibid.*):

> The contention in its farthest reach amounts to a legal version of the scriptural injunction against letting one's right hand know what one's left may be doing.
>
> Obviously it would be consistent neither with good sense nor, we think, with the

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[11] The facts giving rise to this issue are summarized at pp. 10–11, *supra.*

[12] See also, as to the right to take notice of prior records of the same tribunal, *Freshman* v. *Atkins,* 269 U. S. 121, 124; *Craemer* v. *Washington State,* 168 U. S. 124, 129; *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 336; *Dimmick* v. *Tompkins,* 194 U. S. 540, 548; *Bienville Water Supply Co.* v. *Mobile,* 186 U. S. 212, 217; Davis, *Administrative Law* (1950), Chap. 12.

> type of hearing assured by the statute to force the Commission to put on such complete blinders.

We submit that the rule of the *Pierce* case is precisely applicable here. Gilbert was represented in both proceedings; the same right of cross-examination existed; the identical commerce issue was the subject of both proceedings; and Gilbert, far from being prejudiced, cannot deny that the relevant facts "officially noticed" are undisputed.

The Board's purpose in taking official notice of the record in the earlier case was to establish the out-of-state origin of Ford parts. The other facts as to Gilbert's own purchases and sales were restipulated in the second proceeding (G. 140), and its relationship with Ford was likewise there restipulated (G. 140–142). Counsel for Gilbert was well aware that the purpose of taking official notice of the original proceeding was to include in this record the facts as to Ford's operations which had been testified to by a Ford representative (G. 190–193, 59–88). Under these circumstances the Board's right to take "official notice" is supported not only by the *Pierce* case, but also by Section 7 (d) of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1006 (d)), which recognizes the right of an administrative agency to take official notice of material facts not appearing in the record, provided that an affected

party upon timely request is afforded an opportunity to introduce contrary evidence.

The practice followed by the Board of taking official notice of facts contained in the prior proceeding involving Gilbert is identical to that followed by the courts in analogous situations. Thus, in *Nahtel Corporation* v. *West Virginia Pulp & Paper Co.*, 141 F. 2d 1, 2, n. 2 (C. A. 2), the court in deciding the second of two lawsuits involving some, but not all, of the same parties observed that "the stipulation of the parties herein incorporates into this record only a part of the former record; but we take judicial notice of the entire record." See also *Cushman Paper Box Machine Co.* v. *Goddard*, 95 Fed. 664, 666 (C. A. 1); *Goldstein* v. *Groesbeck*, 142 F. 2d 422, 426 (C. A. 2); *United States* v. *City of Philadelphia*, 140 F. 2d 406, 408 (C. A. 3).

The court below advanced several theories in support of its view that the Board's procedure was invalid. We believe they may be briefly disposed of, for, we submit, all are clearly erroneous.

In its original opinion the court observed (D. 156) that Section 9 (d) of the National Labor Relations Act, *infra*, p. 30,[13] did not authorize

[13] Section 9 (d) provides that where an order in an unfair labor practice case rests on facts certified in a representation case, the record in the latter case is to be reviewed when the court reviews the unfair labor practice determination. In this case the bargaining order does not rest upon facts cer-

inclusion of the earlier record. The short answer is, of course, that the Board is relying on official notice and not on Section 9 (d). While Section 9 (d) states that the record of representation proceedings underlying an unfair labor practice case "shall be included in the entire record" on judicial review of the unfair labor practice order, it in no way suggests that other related proceedings, involving the same party, must for this reason be ignored by the Board.[14] The court also stated that "this record does not show what if any facts were certified" from the original proceeding (D. 156), again overlooking the fact that the Board was taking "official notice" of the entire record, and not certifying it under Section 9 (d). Finally, the court stated—we submit, erroneously—that local Union 415 had instituted the earlier proceeding, that the parties involved

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tified in the first representation case; the union lost the election in that case. Hence Section 9 (d) applies only to the record in the second representation case involving Gilbert.

[14] The court, initially misconceiving this point, went on in its original opinion to say (D. 156) that Section 9 (d) "prohibits the receipt of the transcript here, for the order of the Board * * * is not based * * * upon facts certified" in the earlier case. The court, however, apparently abandoned this ground in its later opinion on rehearing, after the Board pointed out that the court itself had recognized that Section 9 (d) did not preclude "the introduction of additional evidence in the complaint proceedings" (D. 156). See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 161, 162; *National Labor Relations Board* v. *Worcester Mills Corp.*, 170 F. 2d 13, 16 (C. A. 1), certiorari denied, 336 U. S. 903.

in the second proceeding were different from those in the first, and that the issues were not necessarily identical (D. 156). The record shows, however (*supra*, pp. 10, 11), that the International Union instituted both proceedings (although it was joined by Local 408 in the second); and, what is decisive, Gilbert was respondent in both cases and the identical issue in both was whether Gilbert's activities affected commerce.

On rehearing, the court below restated its position (D. 169–170). It held that the *Pierce* case was inapplicable because in that case "Each applicant intervened in the proceeding on the other's application" and "the hearings were substantially coordinated" so that "no prejudice was shown" (D. 169). The attempted distinction of *Pierce* is manifestly inadequate; in the instant case the party affected, Gilbert, was already a named party in *both* proceedings, so that no further "coordination" of the cases was required. The court below also stated that Gilbert was "prejudiced" by testimony in the first hearing "from which it might have been concluded that some one of the twenty-two dealers made substantial interstate sales" (D. 170). Although the record in question contains such evidence as to some of the other dealers, the court below erred in finding that Gilbert was "prejudiced" thereby, for nothing in the Board's decision in that case—or in the later

proceedings against Gilbert—suggests that the Board attributed any such sales to Gilbert (or even relied on such sales for its finding that the other dealers were engaged in activities affecting commerce) (G. 24). In short, the Board took official notice of the earlier proceeding with respect to facts relevant to Gilbert; since Gilbert was a party to that proceeding and the issue was identical, Gilbert suffered no prejudice.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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GEORGE J. BOTT,
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National Labor Relations Board.

MAY 1953.

APPENDIX

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country, any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargain-

ing or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; * * *

(b) The Board shall decide in each case whether in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(c) * * * If upon the preponderence of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action

* * * * *

including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of ex-

traordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

2. The relevant provision of the Administrative Procedure Act (60 Stat. 273, 5 U. S. C. 1001, *et seq*), is as follows:

> SEC. 7 (d) * * * Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

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